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No. 88-2058

In The

Supreme Court of the United States

October Term, 1988

PRESIDIO VALLEY FARMERS ASSOCIATION, et al.,

Petitioners,

v.

AMADO SALAZAR-CALDERON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

DAVID G. HALL
TEXAS RURAL LEGAL AID, INC.
259 South Texas Avenue
Weslaco, Texas 78596
Telephone (512) 968-6574

EDWARD J. TUDDENHAM
RICHARDS, WISEMAN, & DURST
600 West Seventh Street
Austin, Texas 78701
Telephone (512) 479-5018

Attorneys for Respondents-Cross Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the private remedies provisions of the Farm Labor Contractor Registation Act permit an award of actual damages for violation of the requirement that an employer comply with the terms of a work agreement and an award of liquidated damages for violations of other provisions of the Act requiring registration, record-keeping, and disclosure of contract terms.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Six farm workers from the Mexican state of Chihuahua initiated this class action over ten years ago to enforce United States labor laws on behalf of more than eight hundred of their colleagues. Five hundred workers came forward to testify at trial and were awarded damages averaging approximately $1,400 each. Seventy-five dollars of that sum represented statutory liquidated damages for violations of five "technical" provisions of a federal statute protecting farm workers; the balance was for actual damages suffered in 1977. Their employers now

seek this Court's intervention to vacate the award of actual damages.

Plaintiffs worked picking onions, melons, chiles, cotton and other crops for the Association members in West Texas during the 1977 growing season. Presidio Valley Farms, Inc., a subsidiary of the largest agribusiness enterprise in Texas engaged in the production, packing and shipping of vegetables, was by far the largest employer. Other farms in the Presidio Valley were owned or operated by smaller firms and individuals. Prior to 1977 the growers employed workers from across the Rio Grande River under onerous conditions for grossly substandard wages; as undocumented workers they had been subject to flagrant exploitation.

1977 promised to be different. The growers agreed with the government to employ the Mexican workers under temporary non-immigrant visas issued pursuant to the "H-2 Program," most for six months and others for a full year. According to the Labor Department regulations governing the program, the workers would be guaranteed employment for 3/4ths of the work-days of the visa period, an "adverse effect wage rate" of $2.83 per hour, free transportation and housing if they had to migrate from outside the area, tools and equipment furnished without charge, and insurance that would compensate them for on-the-job injuries. 20 C.F.R. §§ 602.10a-602.10b (1977); recodified as 20 C.F.R. §§ 655.202-207 (1988). Unfortunately, the promises proved ephemeral.

The court of appeals held that the adverse effect rate was not required because DOL had failed to publish a specific rate for Texas before 1977; the growers simply ignored the rest of the provisions of the DOL regulations.

By ignoring the 3/4ths guarantee, the growers were able to recruit far more workers than they needed, except for a very brief period, and the competition for work was intense. Many workers paid $1.00 per day for transportation to non-existent jobs or to jobs that lasted only a few hours at sub-minimum wages. Most growers paid wages at hourly rates substantially less than $2.20, the federal minimum during 1977, whenever the workers were employed on a piece rate basis. None provided free tools and equipment. In fact, some workers employed to pick cotton received *negative* wages if the illegal transportation and equipment charges are deducted from the gross wages paid. Injured workers were most often dumped back into Mexico to fend for themselves; none of the employers provided the required health or accident insurance.

The growers had also committed themselves, in writing, to comply with other applicable federal and state labor laws, including the Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041-2058 (1974). Among other duties FLCRA required the Association, as an entity that solicited and furnished labor for its members for a fee, to register as a labor contractor, to provide each worker a written disclosure of the terms and conditions of employment, to post those terms at the fields, to keep complete and accurate wage records, to provide written wage receipts to each worker for each pay period, and to abide by the terms of the work agreement. PVFA made no attempt to comply with any of the provisions of the Act,

and in some instances members were blatantly contemptuous of their obligations under the statute.[1]

Plaintiffs brought their action on behalf of the class of 809 workers who had received visas during the 1977 season, alleging breach of contract under several state law theories as well as statutory violations of FLCRA. After certification was initially denied, several hundred workers intervened or filed their own actions. The district court bifurcated the liability and damages issues, and erroneously eliminated several essential elements of the workers' contract claims in determining the liability issues. Plaintiffs then offered to waive their claims for actual damages under both the contract theories and FLCRA if defendants would agree to a simplified trial procedure that would not require individualized damage determinations.[2]

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[1] For example, Oscar Spencer, the "Labor Procurement Director" for the Association, kept payroll records for his farm that were meticulous to the extreme. During pay periods when workers were paid on the piece rate, the number of hours recorded were provided down to the 100ths of an hour. For every worker during that period, the number of hours multiplied by the federal minimum wage of $2.20 per hour always equaled the total wages earned on the piece rate. Undoubtedly, the district court had Mr. Spencer's records in mind when it observed that "records were either poorly kept – not kept – or fraudulently kept." Memorandum Opinion and Order (June 17, 1987), Cert. Petition, p. A-3.

[2] Due to the lack of payroll records, accurate or otherwise, the mostly illiterate workers would have to prove their claims by their own oral recollections of events that occurred several years earlier, a daunting task.

After a brief trial using "representative plaintiffs," the court awarded plaintiffs[3] $15 in liquidated damages for each of five "technical violations" of FLCRA (registration, disclosures, and record-keeping) and $300 for the FLCRA "failure-to-abide-by-the-terms-of-the-work-agreement" violation. The $300 was awarded only to those workers who worked on a piece rate. On cross-appeals, the Fifth Circuit reversed the district court with respect to several elements of the contract, affirmed the denial of class certification but suggested that the court might reconsider that interlocutory decision on remand, and affirmed the $15 liquidated damages awards for the technical violations of FLCRA. *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985). The court vacated the sixth FLCRA liquidated damages award, suggesting that the trial court might reconsider actual damages in light of the revised terms of the contract it had found.

The district court on remand reinstated the actual damages claims for breach of contract, holding that the waiver of those claims had been based upon a mistaken agreement regarding trial procedures and, furthermore, that it would be inequitable to hold plaintiffs to a waiver based upon the erroneous contract terms. Also, acting upon the circuit court's suggestion, the district court reconsidered its earlier decisions, certified the class, and ordered that notice be given to all class members to file proof of claim forms. After seventeen days of trial, during

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[3] The only plaintiffs awarded damages at the first trial were those who had been named as parties prior to 1982 and who had filed answers to defendants' interrogatories.

which more than five hundred witnesses testified through interpreters, the court entered its judgment awarding actual damages for breach of contract to those plaintiffs who testified in person or through relatives with personal knowledge of their employment. The court also included in its judgment the $75 per plaintiff in liquidated damages for the five statutory violations that had previously been affirmed by the Fifth Circuit.

On the second appeal, the Fifth Circuit affirmed that part of the judgment of the district court awarding actual damages for the breach-of-the-agreement violation and modest liquidated damages for violations of the record-keeping and disclosure requirements. *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 863 F.2d 384, 388 (5th Cir. 1989). The court noted that there were no decisions of other courts or legislative history addressing the specific issue of whether actual damages could be awarded for violation of one FLCRA provision and liquidated damages for a distinctly different violation. The court rejected defendants' argument that the judgment permitted a "double recovery":

> We reject PVFA's interpretation of the statute and its argument that allowing both actual and liquidated damages for distinct FLCRA violations constitutes double recovery. The "harm" caused by the five "technical" FLCRA violations, which involved PVFA's failure to process paperwork, bears no relation to the harm that resulted from the sixth FLCRA violation, that the farmers underpaid their workers in violation of the work agreement.

863 F.2d 384, at 388.

After plaintiffs' petitions for rehearing were denied in the court of appeals on March 20, 1989, defendants

filed their petition for a writ of certiorari on June 17, 1989, a copy of which was served upon counsel for respondents on June 19, 1989. The plaintiff farm workers also filed a petition for writ of certiorari, which was docketed with this Court on June 19, 1989 under No. 88-2086. That petition raises issues concerning the relation-back effect of class certification and the deference due the trial court in interpretation of the mandate of the appellate court.

ARGUMENT

The decision of the Court of Appeals for the Fifth Circuit, affirming an award of liquidated damages for some FLCRA violations and actual damages for a distinctly different violation, does not, as asserted by Petitioners, "conflict with all previous judicial interpretations of the statute," nor does it "dangerously expand the power of the district courts to inflict punitive damages on farmers." The interpretation of an ambiguous provision of a statute that was repealed in 1983 was reasonable and was one that furthered the remedial purposes of the Act.

I. The Affirmance Of Liquidated Damages For Five Technical FLCRA Violations Does Not Preclude An Award Of Actual Damages For Breach Of Contract.

According to petitioners, a court may award either liquidated or actual damages under FLCRA, but whichever kind of damages it awards for one violation, it must award for all other violations as well. Using this logic, the defendants argue that, because the court of appeals

affirmed liquidated damage awards for five FLCRA record-keeping and disclosure violations in the 1985 decision, the lower court had to award liquidated damages for the FLCRA "failure-to-abide-by-the-working-arrangement-violation"[4] and could not award actual damages.

FLCRA does not impose the arbitrary limits on damage awards that defendants have proposed. FLCRA authorizes a court to award "damages up to and including the amount of actual damages, or $500 for each violation, or other equitable relief." 7 U.S.C. § 2050a(b) (1974) (repealed). At least as to the issue decided by the court of appeals, the statutory language can hardly be deemed "clear," as petitioners assert. While this language might preclude a court from awarding both liquidated and actual damages for the *same* violation, it in no way limits the court's discretion to award liquidated damages for one violation and actual damages for different violations.[5] The Fifth Circuit so held, and its interpretation is

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[4] The maximum that could be awarded under defendants' theory would be $500. For those workers who suffered permanent injuries and were awarded damages up to $25,000 for the failure of their employers to provide the required insurance, the distinction is enormous. Of course, the ravages of inflation over the last twelve years have reduced the value of all awards by approximately two-thirds.

[5] The legislative history on the repeal of FLCRA and enactment of its replacement legislation, the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-1872 (1983), is likewise not very illuminating. There is certainly no direct expression of intent in the committee

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at least as reasonable as that urged by the Association. The lower courts' interpretations have the additional advantage of furthering the remedial purposes of the Act.

The cases from other circuits cited by the growers do not support their argument and hardly give rise to a conflict among the circuits requiring this Court's intervention. *Espinoza v. Stokely-Van Camp, Inc.*, 641 F.2d 535 (7th Cir. 1981); *Alvarez v. Joan of Arc, Inc.*, 658 F.2d 1217 (7th Cir. 1981); *Rivera v. Anaya*, 726 F.2d 564 (9th Cir. 1984); and *Bueno v. Mattner*, 829 F.2d 1380 (6th Cir. 1987). Like the statute itself, those cases stand for the proposition that a farm worker may only receive one kind of damages – either liquidated or actual – for each separate violation; they do not preclude different kinds of damage awards for different violations. Obviously the Fifth Circuit was aware of that distinction and did not deliberately decide this case in conflict with the companion case on behalf of U.S. workers who were denied employment by these same defendants in the same year, contrary to defendants' suggestion. *Montelongo v. Meese*, 803 F.2d 1341 (5th Cir. 1986).

II. The Fifth Circuit's Interpretation Of FLCRA Does Not Lead To Absurd Results Nor Does It Dangerously Expand The Power Of The District Courts To Award Punitive Damages.

Plaintiffs concur with defendants' logical conclusion that a district court could award actual damages for each

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reports that a court would be precluded from awarding actual damages for one violation of AWPA and liquidated damages for another, unrelated violation. *See* H.R. Rep. No. 97-885, 97th Cong., 2d Sess. (1982).

violation of FLCRA, but do not agree that such an award would be "many times the actual damages actually incurred by the workers." Cert. Pet. p. 15. As long as the damages are proven to be uniquely attributable to discrete violations of the statutory provisions, the cumulative total should still be the "actual damages" incurred. To award the intended beneficiary of the Act her full damages is hardly an absurd result.

Undoubtedly, Congress established a scheme for liquidated damages for at least two reasons: (1) to permit recovery where the proof of actual damages is difficult, if not impossible, and (2) to encourage compliance with the Act. As to the first consideration, a liquidated damages award is uniquely appropriate for violations of the record-keeping and disclosure requirements, where it is difficult to prove the specific harm to any individual worker. On the other hand, a deliberate refusal to comply with the terms of a labor contract is much more likely to result in readily measurable damages. Awarding actual damages for the contract violation does not provide any incentive for the employer to comply with his other obligations under the Act. In fact, failure to award liquidated damages for the record-keeping provisions encourages non-compliance for the mere reason, as was shown dramatically in this case, that the lack of records makes proof of the contract claims extremely difficult.

The very modest $15 award to each plaintiff for the failure of the defendants to maintain accurate, and truthful, payroll records would certainly seem to belie defendants' concerns about the willingness of the district courts to "inflict great financial harm on agricultural growers." Cert. Pet. p. 14. Adequate payroll records

would have, in all likelihood, resulted in a decision in this case many years ago, without the district court having to hear the oral, translated testimony of 507 farm workers trying vainly to remember the number of bushels of chiles they harvested on some day ten years earlier. If ever a district court had incentive to enter a punitive award, it was this district court. Petitioners' concern is misplaced.

CONCLUSION

For the reasons set forth herein, the petition of the Presidio Valley Farmers Association and its members for a writ of certiorari should be denied.

Respectfully submitted,

DAVID G. HALL
TEXAS RURAL LEGAL AID, INC.
259 South Texas Avenue
Weslaco, Texas 78596
Telephone (512) 968-6574

EDWARD J. TUDDENHAM
RICHARDS, WISEMAN, & DURST
600 West Seventh Street
Austin, Texas 78701
Telephone (512) 479-5018

Attorneys for Petitioners